

**38 CFR Part 71****RIN 2900-AR28****Extension of Program of Comprehensive Assistance for Family Caregivers
Eligibility for Legacy Participants and Legacy Applicants.**

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is revising its regulations that govern VA's Program of Comprehensive Assistance for Family Caregivers (PCAFC) by extending eligibility for legacy participants, legacy applicants, and their Family Caregivers and the applicable benefits afforded to Family Caregivers, to include the monthly stipend, by one year. This change will provide VA with an additional year to complete reassessments of legacy participants, legacy applicants, and their Family Caregivers. This change will also ensure that legacy participants, legacy applicants, and their Family Caregivers are treated equitably.

DATES: Effective date: This interim final rule is effective [insert date of publication in the FEDERAL REGISTER].

Comment date: Comments must be received on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Comments must be submitted through www.Regulations.gov. Comments received will be available at [regulations.gov](https://www.regulations.gov) for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: Colleen Richardson, PsyD, Executive Director, Caregiver Support Program, Patient Care Services, Veterans Health

Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420, (202) 461-7337. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Background

In 2010, Congress established section 1720G of title 38 of the United States Code (U.S.C.). Caregivers and Veterans Omnibus Health Services Act of 2010, Public Law (Pub. L.) 111-163, 124 Stat. 1130 (2010). Section 1720G required VA, in part, to establish a Program of Comprehensive Assistance for Family Caregivers (PCAFC) for Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty in the active military, naval, or air service on or after September 11, 2001. VA implemented PCAFC through its regulations in part 71 of title 38, Code of Federal Regulations (CFR). PCAFC provides certain benefits such as training, respite care, counseling, technical support, beneficiary travel (to attend required caregiver training and for an eligible veteran's medical appointments), access to health care (if qualified) through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), and a monthly stipend. 38 U.S.C. 1720G; 38 CFR 71.40.

In 2018, section 161 of the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 (VA MISSION Act of 2018), Pub. L. 115-182, 132 Stat. 1393 (2018), amended 38 U.S.C. 1720G by expanding PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001 in a phased approach, establishing new benefits for designated Primary Family Caregivers of eligible veterans, and making other changes affecting program eligibility and VA's evaluation of PCAFC applications. To incorporate these and other necessary changes to improve and expand VA's PCAFC, VA amended 38 CFR part 71. 85 Federal Register (FR) 46226 (July 31, 2020). These changes took effect on

October 1, 2020. *Id.* As part of that rulemaking, VA revised the eligibility criteria for PCAFC in § 71.20.

VA recognized that there were individuals whose applications had already been received by VA and were in the process of being evaluated under the pre-October 1, 2020 criteria and who would be approved for PCAFC on or after October 1, 2020, as well as individuals who were already participating in PCAFC before October 1, 2020. *Id.* VA classified these individuals as legacy applicants and legacy participants, respectively. 38 CFR 71.15. A legacy applicant is a veteran or servicemember who submits a joint application for PCAFC that was received by VA before October 1, 2020 and for whom a Family Caregiver(s) was approved and designated on or after October 1, 2020, subject to certain criteria. *Id.* A legacy participant is an eligible veteran whose Family Caregiver(s) was approved and designated by VA under 38 CFR part 71 as of September 30, 2020 so long as the Primary Family Caregiver (as applicable) continues to be approved and designated as such. *Id.*

In § 71.30, VA set forth requirements for reassessment to determine whether legacy applicants, legacy participants, and their Family Caregivers would continue to be eligible for PCAFC. Paragraph (e)(1) states that if the eligible veteran is a legacy participant or a legacy applicant, that eligible veteran and their Family Caregiver(s) will be reassessed by VA during the one-year period beginning on October 1, 2020 to determine whether the legacy participant or legacy applicant meets the new eligibility requirements in § 71.20(a). VA acknowledged that it would need to reassess legacy applicants, legacy participants, and their Family Caregivers to determine their continued eligibility for PCAFC, and believed one year from the effective date of the final rule would be necessary and appropriate to ensure these reassessments were completed. 85 FR at 46253.

VA foresaw possible impacts of the new regulation on the legacy cohort. For instance, there was the possibility that a legacy applicant or legacy participant would no longer be eligible for PCAFC under the criteria in § 71.20(a). In addition, there was the possibility that the legacy applicant or legacy participant would be determined eligible for PCAFC, but the Primary Family Caregiver would be eligible for a stipend amount that was less than they were receiving under the previous regulations. Because of these potential impacts, VA allowed for an extension of eligibility under the pre-October 1, 2020 criteria for a one-year transition period under § 71.20(b) and (c) for legacy participants, legacy applicants, and their Family Caregivers. During this transition period, legacy participants, legacy applicants, and their Family Caregivers would continue to be eligible to receive benefits under PCAFC and would not have the amount of their monthly stipend reduced (except as the result of the eligible veteran moving to a new address).

In § 71.40(c)(4), VA set forth requirements for determining monthly stipend amounts for Primary Family Caregivers. This paragraph explains how the stipend is calculated for Primary Family Caregivers of legacy participants and legacy applicants during the one-year transition period.

As explained in the proposed rule, VA believed that a one-year transition period was reasonable. It would allow individuals who are participating in PCAFC as of September 30, 2020, the day before the effective date of the rule, to remain eligible for the program and not experience a stipend amount decrease (except as specified) while VA completes a reassessment to determine eligibility under the new criteria – regardless of when such reassessment occurred during the one-year period. This was important because it would be inequitable for similarly situated veterans and their Family Caregivers to be disadvantaged based solely on when VA conducted their reassessment. In addition, this one-year period would minimize disruption to these

individuals by allowing for a period to plan and adjust to the possibility of a legacy applicant or legacy participant being determined no longer eligible or eligible such that the monthly stipend would be a lesser amount. We believed this to be fair, reasonable, and an appropriate use of taxpayer dollars. 85 FR 13356 (March 6, 2020); 85 FR 46226 (July 31, 2020).

For the reasons explained below, we are extending the one-year transition period and timeline for VA to complete reassessments of legacy applicants, legacy participants, and their Family Caregivers for one additional year. Legacy applicants, legacy participants, and their Family Caregivers will remain eligible for PCAFC in accordance with revised § 71.20(b) and (c) and will continue to receive benefits in accordance with revised § 71.40 for the additional one-year period. Accordingly, we are amending §§ 71.20(b) and (c) regarding program eligibility, § 71.30(e) regarding reassessments, and §§ 71.40(c)(4)(i)(B) through (D), (c)(4)(ii)(C)(2)(i) and (ii), and the note to (c)(4)(ii)(C)(2) regarding the stipend methodology, to account for the additional one-year period through September 30, 2022.

Discussion

When the prior rulemaking became effective on October 1, 2020, VA intended to complete reassessments for all legacy participants, legacy applicants, and their Family Caregivers within a one-year period to determine their eligibility under new § 71.20(a); however, this is no longer achievable. For the reasons explained below, VA is unable to conduct all necessary reassessments of legacy applicants, legacy participants, and their Family Caregivers within the one-year period. It is therefore necessary to extend PCAFC eligibility of legacy applicants, legacy participants, and their Family Caregivers under §§ 71.20(b) and (c) and their applicable benefits, including the monthly stipend

calculation under § 71.40(c)(4), for an additional one-year period through September 30, 2022.

The VA MISSION Act of 2018 expanded eligibility for PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001 in a phased approach. The first phase, which became effective on October 1, 2020, expanded PCAFC eligibility to include eligible veterans who incurred or aggravated a serious injury in the line of duty on or before May 7, 1975. Since the onset of this first phase of expansion, VA has seen a dramatic increase in new applications for PCAFC. This increase is significantly higher than VA anticipated.

We acknowledge that anticipating the number of applications that may be received is subject to significant variability and subjectivity. An individual need not be eligible to apply for PCAFC; there is no restriction on who may choose to apply. However, VA estimated that it would receive 76,635 applications in FY 2021, and as of July 1, 2021, VA has received approximately 90,500 applications. The number of applications received so far exceeds the total number of applications PCAFC received in any previous year and exceeds VA's projections for the entire FY 2021. For reference, in FY 2020, VA received approximately 22,900 applications, with an average of 1,900 applications per month. Between October 1, 2020 and July 1, 2021, VA has received an average of approximately 10,000 applications per month.. We note that, of the approximately 90,500 applications VA received between October 1, 2020 and July 1, 2021, approximately 11 percent of these veteran applicants were born in 1983 or later, demonstrating that new applicants are not only from those veterans who have been waiting for expansion to begin, but also from veterans who may have incurred or aggravated a serious injury in the line of duty on or after September 11, 2001, and are newly interested in the Program.

As part of planning for PCAFC expansion, a staffing model was developed to guide and inform staffing decisions to augment resources available to administer, monitor, and oversee PCAFC. In particular, this action was necessary to prepare for the anticipated increased workload associated with expanding PCAFC, to include application processing, completion of wellness contacts, completion of reassessments, and supporting delivery of clinical care. The first phase of the staffing augmentation called for an additional 680 field based and Veteran Integrated Service Network (VISN) level staff to support administration and delivery of caregiver support programming. The second phase of staffing augmentation began in August 2020 and sought to add over 750 additional field-based front-line staff. As of July 2021, over 90 percent of staff had been hired.

Despite these staffing augmentations, given the significantly larger volume of applications than was anticipated, VA focused its resources on processing new applications versus reassessing eligibility of legacy applicants, legacy participants and their Family Caregivers. As a result, as of July 1, 2021, VA has only completed 4 percent of the estimated 19,800 reassessment needed for the legacy cohort. VA will be unable to complete reassessments of each legacy applicant, legacy participant, and their Family Caregiver(s) within the one-year period provided in § 71.30(e)..

While VA received higher than anticipated applications, it is important to note that educating and training new staff as well as educating and training existing staff on the program changes has continued, culminating in more streamlined processes, implementation of best practices, and increased efficiencies. As a result of these efforts, VA has significantly increased the rate in which applications are being adjudicated. During the first quarter of FY 2021, VA adjudicated an average of 4,075 applications per month. In comparison, during the third quarter of FY 2021, VA adjudicated an average of 10,663 applications per month – an increase of 162 percent

in adjudications made. While VA's rate of application adjudication has been increasing, there has been a corresponding decrease in the number of new PCAFC applications being received. The average number of applications received each month in the third quarter of FY 2021 was approximately 7,300 compared to an average of approximately 11,600 each month during the first quarter – a decrease of approximately 59 percent in the average number of new applications received each month (during third quarter compared to first quarter). As noted above, VA's rate of adjudicating applications has increased with the passage of time during FY 2021. With the rate of new application submissions decreasing and adjudications of such new applications increasing, VA has been able to devote more resources to reassessments of legacy participants, legacy applicants, and their Family Caregivers. With these continued efforts, VA believes that reassessments of legacy participants, legacy applicants, and their Family Caregivers will be able to be completed with the extension of an additional one-year period.

Extending the eligibility period of legacy participants, legacy applicants, and their Family Caregivers from a one-year period to a two-year period from October 1, 2020 will ensure that all legacy participants, legacy applicants, and their Family Caregivers have the same transition period and the same effective date for any termination or reduction in benefits, regardless of when VA conducts the reassessment during the two-year period. Without this extension, legacy applicants, legacy participants, and their Family Caregivers who are reassessed and found to be no longer eligible for PCAFC under § 71.20(a) or who have their stipend reduced under § 71.40(c)(4) would be impacted at different times, resulting in unequal treatment in the provision of PCAFC benefits. As noted above, VA has already begun conducting some reassessments. If those individuals were determined through a reassessment completed before October 1, 2021, to be no longer eligible for PCAFC or to be eligible but the Primary Family Caregiver would receive a lesser stipend amount, an advanced notice would be issued

to the legacy applicants, legacy participants, and their Family Caregivers on October 1, 2021 (at the conclusion of the one-year period) and the change would take effect not less than 60 days following this notification. For those determined to no longer be eligible, benefits would be extended for an additional 90 days after the date of discharge. Individuals who VA is unable to reassess prior to October 1, 2021 and who are ultimately determined not eligible or eligible but with a lesser stipend amount would continue to receive benefits in effect prior to October 1, 2020 for longer than those reassessed prior to October 1, 2021 for no reason other than when VA conducted their reassessment.

When VA established the initial one-year transition period for legacy participants, legacy applicants, and their Family Caregivers, it was intended to provide a reasonable amount of time for VA to conduct reassessments, minimize disruption to those individuals, and provide a fair and reasonable time for transition. 85 FR at 46253. VA intended that all legacy applicants, legacy participants, and their Family Caregivers would have the same transition period, regardless of when the reassessment is completed during the one-year transition period. *Id.* This transition period was intended to ensure equitable treatment for all legacy applicants, legacy participants, and their Family Caregivers. *Id.* Extending the transition period for an additional year beyond the one-year period beginning October 1, 2020 for all legacy participants, legacy applicants, and their Family Caregivers will continue to ensure equitable treatment among this cohort.

Changes to 38 CFR Part 71

For the reasons explained above, VA amends its regulations codified in § 71.20 regarding program eligibility, § 71.30 regarding reassessments, and § 71.40 regarding caregiver benefits, to extend the transition period for legacy applicants, legacy

participants, and their Family Caregivers from one year to two years (that is, until October 1, 2022) and to extend the time period for reassessments of such individuals from one year to two years (that is, until October 1, 2022).

VA amends § 71.20 by removing the words “one year” in §§ 71.20(b) and (c), and adding, in their place, the words “two years”.

VA amends § 71.30 by removing the words “one-year” in paragraphs (e)(1) and (2) and adding, in their place, the words “two-year”.

VA also amends § 71.40 by removing the words “one year” in paragraphs (c)(4)(i)(B) through (D) and adding, in their place, the words “two years”. VA similarly amends paragraph (c)(4)(ii)(C)(2)(i) by removing the words “one-year” and adding, in their place, the words “two-year”. Lastly, VA amends paragraph (c)(4)(ii)(C)(2)(ii) and the note to paragraph (c)(4)(ii)(C)(2) by removing the words “the date that is one year after October 1, 2020”, and adding, in their place, the words “October 1, 2022”.

Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause under the provisions of 5 U.S.C. 553(b)(B) to waive prior notice and an opportunity for public comment and publish this rule, as notice and comment would be contrary to public interest. VA is issuing this rule to extend the time to complete reassessments for legacy applicants, legacy participants, and their Family Caregivers for an additional year, through September 30, 2022, and to similarly extend the transition period. As discussed earlier, VA will not be able to complete the required reassessments of this legacy cohort by October 1, 2021.

Absent regulatory action, effective October 1, 2021 the reassessment period of legacy applicants, legacy participants, and their Family Caregivers sunsets. This would leave legacy applicants, legacy participants, and their Family Caregivers in a state of uncertainty about their status and eligibility for benefits moving forward.

Extending the reassessment period in advance of October 1, 2021 will provide clarity to the legacy applicants, legacy participants, and their Family Caregivers about the duration of their current benefits and about next steps. Additionally, if the date to complete the reassessments and the period of transition is not extended, legacy applicants, legacy participants, and their Family Caregivers who are reassessed and found to be no longer eligible for PCAFC, or eligible but with a reduced stipend amount, would be impacted at different times. Some legacy participants, legacy applicants, and their Family Caregivers would experience negative impacts before others within this same cohort based on when they are reassessed. The varying impact would result from no reason other than that VA was able to reassess certain individuals earlier than others. Therefore, VA must amend its regulations to provide a one-year extension for the reassessment period and for VA to conduct the reassessments.

Notwithstanding the effective date of this rulemaking, VA invites public comments on this interim final rule and will fully consider and address any comments received. Generally, VA would seek notice and comment in advance of a rule becoming effective. However, in this circumstance, VA does not have sufficient time to provide the public with the opportunity for prior notice and comment and have the amendments effective by October 1, 2021. As noted earlier in the preamble, the number of applications received has far exceeded expectations, and by focusing its resources on processing new applications (while also implementing new regulations and processes for evaluating PCAFC eligibility), VA was unable to prioritize the reassessment of legacy participants, legacy applicants, and their Family Caregivers. In October 2020, VA received an estimated 18,400 applications with a decline in applications received in November and December 2020. However, during the second quarter of FY 2021, VA received another surge in applications, which further delayed VA's ability to prioritize the reassessment of legacy participants, legacy applicants, and their Family Caregivers. To

manage these competing issues, VA explored options to complete the reassessments while continuing to process applications. During this exploration, however, VA determined that, even with processing applications while conducting legacy reassessments, an additional 12-month period would be required to complete the legacy reassessments, which is the basis for this interim final rule.

For the reasons stated above, the Secretary also finds good cause under 5 U.S.C. 553(d)(3) to make this interim final rule effective on the date of its publication in the Federal Register.

VA recognizes that this extension will continue for an additional year the existing disparity between PCAFC participants who applied for the program on or after October 1, 2020 (and were approved for PCAFC based on the existing regulatory criteria), and legacy participants, legacy applicants, and their Family Caregivers (who were approved for PCAFC based on pre-October 1, 2020 regulatory requirements). However, any harm associated with continuing the current inequity between these two cohorts for an additional one-year period, does not outweigh the harm associated with the alternative outcomes that would result in the absence of this regulatory action. In contrast to PCAFC participants who applied for the program on or after October 1, 2020, legacy participants and their Family Caregivers were not aware of the regulatory changes that would go into effect on October 1, 2020, and are therefore at the greatest risk of being affected by those changes.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive

impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). This interim final rule extends the time for VA to conduct legacy reassessments and the transition period for legacy applicants, legacy participants, and their Family Caregivers. This rule has no impact on small entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This interim final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 71

Administrative practice and procedure, Caregivers program, Claims, Health care, Health facilities, Health professions, Mental health programs, Travel and transportation expenses, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on July 30, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Consuela Benjamin,

Regulations Development Coordinator,
Office of Regulation Policy & Management,
Office of General Counsel,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 71 as follows:

PART 71 – CAREGIVERS BENEFITS AND CERTAIN MEDICAL BENEFITS OFFERED TO FAMILY MEMBERS OF VETERANS

1. The authority citation for part 71 continues to read as follows:

AUTHORITY: 38 U.S.C. 501, 1720G, unless otherwise noted.

Section 71.40 also issued under 38 U.S.C. 111(e), 1720B, 1782.

Section 71.47 also issued under 31 U.S.C. 3711; 38 U.S.C. 5302, 5314.

Section 71.50 also issued under 38 U.S.C. 1782.

§ 71.20 [Amended]

2. Amend § 71.20 in paragraphs (b) and (c) by removing “one year” and adding “two years” in its place.

§ 71.20 [Amended]

3. Amend § 71.30 in paragraphs (e)(1) and (2) by removing “one-year” and adding “two-year” in its place.

§ 71.40 [Amended]

4. Amend § 71.40:

- a. In paragraphs (c)(4)(i)(B) introductory text and (c)(4)(i)(C) and (D), by removing the words “one year” and adding in their place the words “two years”.

- b. In paragraph (c)(4)(ii)(C)(2)(i), by removing the words “one-year” each place they appear and adding in their place the words “two-year”.

- c. In paragraph (c)(4)(ii)(C)(2)(ii) and note to paragraph (c)(4)(ii)(C)(2), by

removing the words “the date that is one year after October 1, 2020” each place they appear and adding in their place the words “October 1, 2022”.

[FR Doc. 2021-20112 Filed: 9/21/2021 8:45 am; Publication Date: 9/22/2021]